U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF V-C-, LLC

DATE: JUNE 10, 2016

APPEAL OF NEBRASKA SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a software development and consulting business, seeks to employ the Beneficiary as a senior programmer analyst. It requests classification of the Beneficiary as a member of the professions holding an advanced degree under the second preference immigrant classification. *See* Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). This employment-based immigrant classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent resident status.

The Director, Nebraska Service Center, denied the petition. The Director determined that the job offered required less than an advanced degree. Specifically, the Director found that, because the Petitioner would accept "any combination of education evaluated equivalent to [a] bachelor's degree," the minimum requirements for the position were less than an advanced degree.

The matter is now before us on appeal. The Petitioner asserts that the proffered position requires a professional holding an advanced degree or its equivalent and that its acceptance of a combination of education evaluated as a bachelor's degree was only intended to encourage additional applicants to apply for the position. Upon *de novo* review, we will dismiss the appeal.

I. LAW AND ANALYSIS

Employment-based immigration is generally a three-step process. First, an employer must obtain an approved labor certification from the U.S. Department of Labor (DOL). *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). Next, U.S. Citizenship and Immigration Services (USCIS) must approve an immigrant visa petition. *See* section 204 of the Act, 8 U.S.C. § 1154. Finally, the foreign national must apply for an immigrant visa abroad or, if eligible, adjustment of status in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

As required by statute, an ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the DOL, accompanies the instant petition. By approving the labor certification, the DOL certified that there are insufficient U.S. workers who are able, willing, qualified, and available for the offered position. Section 212(a)(5)(A)(i)(I) of the Act. The DOL also certified that the employment of a foreign national in the position will not adversely affect the wages and working conditions of domestic workers similarly employed. Section 212(a)(5)(A)(i)(II).

In these visa petition proceedings, USCIS determines whether a foreign national meets the job requirements specified on a labor certification and the requirements of the requested immigrant classification. *See* section 204(b) of the Act (stating that USCIS must approve a petition if the facts stated in it are true and the foreign national is eligible for the requested preference classification); *see also, e.g., Tongatapu Woodcraft Haw., Ltd. v. Feldman*, 736 F. 2d 1305, 1309 (9th Cir. 1984); *Madany v. Smith*, 696 F.2d 1008, 1012-13 (D.C. Cir. 1983) (both holding that the immigration service has authority to make preference classification decisions).

The priority date of this petition, which is the date the DOL accepted the labor certification for processing, is April 28, 2014.[1] *See* 8 C.F.R. § 204.5(d).

In Part H, the labor certification states that the offered position has the following minimum requirements:

H.4. Education: Bachelor's degree in computer science, engineering (any), MIS, CIS or business administration.

. . .

H.6. Experience in the job offered: None required.
H.7. Alternate field of study: None accepted.
H.8. Alternate combination of education and experience: None accepted.
H.9. Foreign educational equivalent: Accepted.
H.10. Experience in an alternate occupation: 60 months as a programmer analyst, senior quality analyst, quality analyst, or any IT related [position.]
H.14. Specific skills or other requirements: Any combination of education evaluated equivalent to bachelor's degree is accepted. Travel & relocation for short periods to unanticipated locations throughout the U.S. may be required.

A. Classification as an Advanced Degree Professional

Section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.* 8 C.F.R. § 204.5(k)(4) states in pertinent part that "[t]he job offer portion of an individual labor certification, Schedule A application, or Pilot

[1] The priority date is used to calculate when the beneficiary of the visa petition is eligible to adjust his or her status to that of a lawful permanent resident. *See* 8 C.F.R. § 245.1(g).

Program application must demonstrate that the job requires a professional holding an advanced degree or the equivalent of an alien of exceptional ability."

While the Petitioner asserts that 8 C.F.R. § 204.5(k)(2) only prohibits combining professional studies, training or experience in order to achieve an equivalent of a foreign degree, the regulation uses the term "degree," indicating that a professional with the equivalent of an advanced degree must possess a single U.S. bachelor's degree or foreign equivalent degree, without combining experience or lesser educational degrees. *Compare* 8 C.F.R. § 204.5(k)(3)(ii)(A) (allowing "a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning" to demonstrate qualifications as an "alien of exceptional ability").

Legislative history also supports Congressional intention to require a single, uncombined bachelor's degree for advanced degree professional purposes. In "considering equivalency in category 2 advanced degrees, it is anticipated that the alien must have a bachelor's degree with at least five years progressive experience in the professions." H.R. Conf. Rep. No. 101-955 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6784, 6786. Legacy Immigration and Naturalization Service (legacy INS) found that "both the Act and its legislative history make clear that, in order to qualify as a professional under the third classification or to have experience equating to an advanced degree under the second, an alien must have at least a bachelor's degree." Final Rule for Immigrant Visa Petitions, 56 Fed. Reg. 60897, 60900 (Nov. 29, 1991); *see also SnapNames.com, Inc. v. Chertoff*, No. CV 06-65-MO, 2006 WL 3491005, at 10-11 (D. Or. Nov. 30, 2006) (upholding our determination that beneficiaries of immigrant visa petitions seeking classification as professionals or advanced degree professionals are statutorily required to hold at least a single baccalaureate degree).

Thus, in the instant case, the job offer portion of the accompanying labor certification must demonstrate that the job requires a single U.S. bachelor's degree or foreign equivalent degree, without combining experience or lesser educational degrees, followed by five years of progressive experience in the specialty.

On appeal, the Petitioner states that the Beneficiary qualifies for the position and the Director's finding that the position did not qualify as an advanced degree professional is unreasonable. Whether the instant Beneficiary holds the degree required for the offered position is not in question in this case. Rather, the issue is that the proffered position's minimum requirements, as stated on the labor certification, do not require an advanced degree.

Part H.14 of the labor certification indicates that the Petitioner will accept "any combination of education evaluated equivalent to a bachelor's degree." As previously discussed, the regulations and legislative history indicate that an advanced degree professional must possess a single U.S. bachelor's degree or foreign equivalent degree without combining experience or lesser educational degrees. The job offer portion of the labor certification therefore does not demonstrate that the offered position requires a professional holding an advanced degree or the equivalent.

The Petitioner asserts that section H.9 of the labor certification speaks of a "foreign educational equivalent," not a foreign equivalent degree, which indicates that it would only accept the foreign educational equivalent of a U.S. bachelor's degree, rather than a combination of lesser degrees or a foreign equivalent degree.

In evaluating the job offer portion of the labor certification to determine the required qualifications for the position, USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to "examine the certified job offer *exactly* as it is completed by the prospective employer." *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984)(emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve "reading and applying *the plain language* of the [labor certification]." *Id.* at 834 (emphasis added). USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification. We must therefore consider the language in Part H.14 of the ETA Form 9089 when determining the minimum job requirements of the offered position. Although Parts H.4 and H.9 of the form state that a bachelor's degree or a foreign educational equivalent is required, Part H.14 indicates that the equivalency of a bachelor's degree can include "any combination of education evaluated equivalent to a U.S. bachelor's degree."

The Petitioner cites to a January 7, 2003, letter from [redacted] of the legacy INS Office of Adjudications to counsel in other cases, expressing his opinion about the possible means to satisfy the requirement of a foreign equivalent of a U.S. advanced degree for purposes of 8 C.F.R. § 204.5(k)(2). We note that private discussions and correspondence solicited to obtain advice from USCIS are not binding on us or other USCIS adjudicators and do not have the force of law. *Matter of Izummi*, 22 I&N 169, 196-197 (Comm'r 1968); *see also*, Memorandum from Thomas Cook, Acting Associate Commissioner, Office of Programs, Legacy INS, *Significance of Letters Drafted By the Office of Adjudications* (December 7, 2000). Moreover, as discussed above, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) is clear in allowing only for the equivalency of one foreign degree to a United States baccalaureate, not a combination of degrees, diplomas or employment experience. Additionally, although 8 C.F.R. § 204.5(k)(2), as referenced in [redacted] correspondence, permits a certain combination of progressive work experience and a bachelor's degree to be considered the equivalent of an advanced degree, there is no comparable provision to substitute a combination of degrees, work experience, or certificates which, when taken together, equals the same amount of coursework required for a U.S. baccalaureate degree.

The Petitioner asserts that "any combination of education" does not mean a combination of lesser degrees, but rather, a combination of foreign degrees that are considered equivalent to a U.S. bachelor's degree, such as:

- A three-year bachelor's degree and a two-year master's degree in India.
- A three-year bachelor's degree, a two-year master's degree, and a one-year postgraduate diploma in India.
- A three-year bachelor's degree and a one-year bachelor of education in India.

We consider the Association of Collegiate Registrars and Admissions Officers (AACRAO) Electronic Database for Global Education (EDGE) to be a reliable, peer-reviewed source of information about foreign credentials equivalencies upon which we adjudicate whether a beneficiary's qualifications meet the requirements of a labor certification. According to its website, AACRAO is "a nonprofit, voluntary, professional association of more than 11,000 higher education admissions and registration professionals who represent more than 2,600 institutions and agencies in the United States and in over 40 countries around the world." *See About AACRAO*, AACRAO, www.aacrao.org/home/about (accessed May 26, 2016). Its mission "is to serve and advance higher education by providing leadership in academic and enrollment services." *Id.* EDGE is "a web-based resource for the evaluation of foreign educational credentials." *See AACRAO EDGE*, AACRAO, http://edge.aacrao.org/info.php (accessed May 26, 2016).

We have reviewed the credential advice in EDGE for the Petitioner's examples. In the first two examples EDGE advises that the foreign master's degrees equate to U.S. bachelor's degree on their own. Therefore, beneficiaries with those credentials possess single degrees equivalent to a U.S. bachelor's degree. In the third example, EDGE advises that the bachelor of education combined with a three-year bachelor's degree equates to a U.S. bachelor's degree. However, such a combination is specific and unique to the field of education and enables individuals to teach at the secondary level. Here, education is not a field of study required for the proffered position and the Petitioner has not demonstrated that a degree in education is relevant to this petition. In contrast to the examples provided by the Petitioner, the statement in Part H.14 of the ETA Form 9089 suggests the Petitioner's acceptance of a combination of lesser degrees - such as multiple associate's degrees or multiple three-year bachelor's degrees to equal a U.S. bachelor's degree - degree combinations that EDGE does not find to equate to a U.S. bachelor's degree.

In the instant case, the plain language of the labor certification is that the Petitioner would accept a combination of educational credentials less than a U.S. bachelor's degree or foreign equivalent degree. As such, the minimum requirements of the labor certification are less than those required for the advanced degree professional category.

B. The Beneficiary's Experience

Although not addressed by the Director, we independently note that, even if the Petitioner had established that the minimum requirements of the labor certification were an advanced degree, the record does not establish that the Beneficiary possesses the required experience.

A petitioner must establish a beneficiary's possession of all the education, training, and experience specified on an accompanying labor certification by a petition's priority date. 8 C.F.R.

§§ 103.2(b)(1), (12); *see also Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). The record contains evidence demonstrating that the Beneficiary gained five years of progressive experience in the specialty as a quality analyst with [redacted] India, from June 1, 2004 to July 1, 2005, and as a quality analyst with [redacted] United Kingdom, from October 1, 2005 to October 10, 2009.

The record contains a copy of the Beneficiary's bachelor of technology in electronics and communications diploma from [redacted] India, issued on April 4, 2005. The regulation at 8 C.F.R. § 204.5(k)(3)(i) states that a beneficiary must have at least five years of progressive post-baccalaureate experience in the specialty in order to qualify as an advanced degree professional. While the diploma indicates that the Beneficiary took his final exams in April 2004, the date of issuance of the accompanying consolidated marks memo/credit sheet has been cut off. The record is unclear as to whether the Beneficiary completed all of his degree requirements prior to June 1, 2004, the date on which he claims to have commenced the qualifying five years of progressive experience in the specialty. In any future filings, the Petitioner must submit a copy of the consolidated marks memo/credit sheet with a date of issuance, as well as the Beneficiary's individual sheet of marks for each semester reflecting the date on which the exam results were posted.

C. Ability to Pay the Proffered Wage

We also note that the record does not establish that the Petitioner has the ability to pay the proffered wage from the priority date onwards.

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, USCIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). Where a petitioner has filed multiple petitions, we will also consider the petitioner's ability to pay the combined wages of each beneficiary. *See Patel v. Johnson*, 2 F.Supp.3d 108 (D. Mass. 2014); *see also Great Wall* at 144-145.

The proffered wage as stated on the ETA Form 9089 is $105,498 per year.

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the Beneficiary's 2014 Internal Revenue Service (IRS) Form W-2, Wage and Tax Statement, indicates that the Petitioner paid him $50,253.12. As the Petitioner paid the Beneficiary partial wages in 2014, it must establish that it had the ability to pay the difference between the proffered wage and the actual wages paid in 2014, which is $55,244.88.

In addition, USCIS records indicate that the Petitioner has filed Form I-140 immigrant petitions on behalf of at least 32 other immigrant beneficiaries which were pending or approved from the instant priority date onwards. In determining whether a petitioner has established its ability to pay the proffered wage to multiple beneficiaries, USCIS will add together the proffered wages for each beneficiary for each year starting from the priority date of the instant petition.[2]

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.[3]

While the Petitioner's 2014 Form 1120, U.S. Corporation Income Tax Return, indicates that it had $581,993 in net current assets, more than the difference between the instant Beneficiary's proffered wage and actual wages paid, the record of proceedings does not contain evidence regarding the beneficiaries of its other Form I-140 immigrant petitions.

In any future filings, the Petitioner must submit its annual reports, federal tax returns or audited financial statements for 2015, if available, and any Forms W-2 or 1099 issued to the Beneficiary for 2015. The Petitioner must also submit information for each beneficiary on whose behalf it has filed a

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[2] However, the wages offered to the other beneficiaries are not considered after the dates the beneficiaries obtained lawful permanent residence, or after the dates their Form I-140 petitions have been withdrawn, revoked, or denied without a pending appeal. In addition, USCIS will not consider a petitioner's ability to pay additional beneficiaries for each year that the beneficiary of the instant petition was paid the full proffered wage.

[3] According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

Form I-140, including the priority date, proffered wage, and actual wages paid for each petition.

II. CONCLUSION

In summary, the job offer portion of the accompanying labor certification does not demonstrate that the offered position requires a professional holding an advanced degree or its equivalent. The Director's decision denying the petition is affirmed. The record also does not establish the Beneficiary's possession of five years of post-baccalaureate experience by the petition's priority date or the Petitioner's ability to pay the proffered wage from the priority date onwards.

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966); *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.

Cite as *Matter of V-C-, LLC*, ID# 17464 (AAO June 10, 2016)